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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHAUNCEY CROWDER,

Defendant and Appellant.

D074884

(Super. Ct. No. RIF1602244)

APPEAL from a judgment of the Superior Court of Riverside County,
Mac R. Fisher, Judge. Affirmed in part and reversed in part, with directions.

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Matthew Mulford, Steve Oetting
and Daniel J. Hilton, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Chauncey Crowder of voluntary manslaughter as a lesser included offense to the charge of murder, after acquitting him of murder (Pen. Code, §§ 187, subd. (a), 192, subd. (a); count 1).¹ The jury found true allegations Crowder personally and intentionally discharged a firearm proximately causing great bodily injury or death to another person (§ 12022.5, subd. (a)). In a bifurcated proceeding, Crowder admitted allegations of two prior serious offenses (§ 667, subd. (a)), which also qualified as strike offenses (§§ 667, subds. (b)–(i); 1170.12). The court sentenced Crowder to an aggregate term of 39 years to life in state prison based upon a mandatory indeterminate term of 25 years to life for count 1 under the three strikes law (§ 1170.12, subd. (c)(2)(A)) plus four years for the firearm enhancement (§ 12022.5, subd. (a)) and five years each for the serious felony prior enhancements (§ 667, subd.(a)).

Crowder contends on appeal: (1) the trial court abused its discretion when it declined to strike his prior convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504 (*Romero*), (2) the abstract of judgment should be corrected to accurately reflect the statutory references for the firearm and prior serious felony enhancements, and (3) the matter should be remanded to permit the court to consider exercising its newly conferred discretion to strike or dismiss the firearm enhancement under section 12022.5, subdivision (c) as amended by Senate Bill No. 620

¹ Statutory references are to the Penal Code unless otherwise stated.

(2017-2018 Reg. Sess.) (Stats. 2017, ch. 682, § 1) and/or the prior serious felony enhancements under amended sections 667, subdivision (a), and 1385 as amended by Senate Bill No. 1393 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1013, §§ 1–2).

We conclude the court did not abuse its discretion in declining to strike one or more of his prior convictions. However, we remand the matter to allow the court the opportunity to consider whether to strike or dismiss the serious felony prior enhancements and/or the firearm enhancement under the amended statutes, and to amend the abstract of judgment as necessary to accurately reflect the statutory basis for any sentence enhancements.

BACKGROUND

A

In May 2016 Crowder picked up a car from the wife (Wife) of Crowder's friend who was in jail. Crowder's friend told Wife to give Crowder the keys to the car. Wife had met Crowder a few times and he helped move them into their home.

A few days later, Crowder told Wife someone wanted the car and threatened to shoot him if they saw him in the car. Wife offered to take the car back, but Crowder said he would park it.

Wife and her children pulled up to their home on the evening of May 11, 2016, and saw a pickup truck parked in front of the house. Two men were standing under a tree whom she recognized as associates of her husband. One man was Crowder. She had

seen the other man with her husband and initially thought he was her husband's cousin.

Later, she realized he was F.B.² Wife sent her children into the house.

F.B. asked Wife about her husband's case and offered to help with attorney fees. He then asked about some rims.³ Wife said she had seen the rims in the garage, but they were no longer there.

F.B. searched the garage. When F.B. did not find them in the garage, F.B. asked to look in the backyard. Wife said they had two dogs in the back. She said she would ask her husband because she was planning to see him that evening. She exchanged numbers with F.B. so she could call him with the information. F.B. said he was not worried about the dogs. Wife let him check the backyard. Wife felt uncomfortable because F.B. would not leave, but she said she did not feel threatened.

Wife's son (Son) came out of the house several times to check on his mother. F.B. reassured Son his mother was fine and told him he could go back in the house. Crowder, who appeared scared, gestured and commented to Son that everything was not okay.

Crowder followed Son back into the house. At some point, Crowder showed Son a gun and asked if Son could see it under his shirt. Son got one of his father's shirts for Crowder to wear so the gun was not visible. Son was worried because his mother was

² For privacy reasons, we refer to the victim in this case by his initials. Similarly, we use generic terms to describe the witnesses to the incident.

³ The witnesses variously refer to F.B. searching for tires or rims. Because the precise item he was searching for is not relevant to the appeal, we use the term rims.

outside with a man Son did not know and Crowder had shown him a gun saying everything was not okay.

Wife was opening the door to the house as F.B. came out of the backyard and Crowder came out of the house. F.B. asked Crowder if he had the rims. Crowder said no and walked past them.

F.B. saw Son standing inside when Crowder came out of the house. F.B. said, "Hey, let me holler at little man." When Wife asked who he meant, F.B. said, "Little man. Let me holler at little man real quick." Wife said he did not need to speak to her son. F.B. said, "Nah, I just need to holler at little man." Wife said that was not going to happen. F.B. continued to insist and moved as though he were going to enter the house. Wife's baby was nearby. F.B. appeared aggressive. At that point, Crowder came back.

Crowder pointed the gun at F.B.'s head and said, "It's not going down like this." F.B. ducked, raised his hands, and ran through the doorway into the house. Crowder shot F.B. three times. F.B. kicked the front door closed. Son grabbed the baby and ran one way as Wife ran another. Wife went back and locked the door. She told Son to call 911. When Crowder knocked on the door, Wife told him to go away. F.B. crawled toward the front bathroom.

Wife locked the door because she did not know what Crowder would do. She was not afraid of Crowder, but there was confusion and she was afraid for her children in the situation.

F.B. died from a gunshot wound to the abdomen. The bullet entered through the arm and then entered the abdomen where it severed an artery.

Police officers apprehended Crowder a few blocks away from Wife's home when he waved down officers. After officers expressed concern about a child finding the weapon, Crowder directed them to a nearby trash can where they recovered the gun. The handgun had three expended cartridges.

B

Crowder testified on his own behalf. After serving two prison terms for aggravated robbery, he moved to California to attend a drug program and try to get on his feet. Wife's husband befriended Crowder, gave Crowder clothes, helped Crowder find a place to live, and showed Crowder around town.

A few days after Crowder picked up the car from Wife, one of her husband's associates told Crowder, "If my homeboys see you riding in this car, they'll shoot you in your head." Crowder understood this to be a reference to gang members and a serious threat. Crowder parked the car down the street from his house.

On the afternoon of the shooting, Crowder returned to his home to find a pickup truck in the driveway and three men in his house along with the person with whom he shared the home. Crowder recognized one man as a cousin of Wife's husband, but he did not know the other two. He later learned one man was F.B. The cousin said, "You already know what we here for," flashed the top portion of a gun in his waistband, and then added, "Let me get them keys."

Crowder gave the keys to F.B. Crowder said the car was parked around the corner. The cousin said Crowder owed Wife's husband money. Based on the earlier comment, Crowder thought they were going to shoot him.

F.B. asked Crowder to show him where the car was parked. Although the car was nearby, F.B. said, "Well, let's just ride." Crowder got into the pickup truck with F.B. alone.

After Crowder pointed out where the car was parked, F.B. drove past the car and said they were going to tell Wife that Crowder had the car. Crowder said they could just call Wife. F.B. said they needed to have a face-to-face meeting. Crowder asked to get out of the pickup truck saying he did not feel comfortable taking F.B. to Wife's house. Crowder said he had never met F.B. before and was scared.

When F.B. said, "That's a \$38,000 car you been driving," Crowder thought it must be F.B.'s car. This made Crowder nervous and scared.

Crowder saw a bulge in F.B.'s pocket, which he thought was a pistol. Crowder thought about jumping out of the pickup truck but did not have an opportunity. F.B. drove erratically, suggesting they were being followed.

Crowder said, "Let me out. I don't want to go down here." F.B. said he already knew where Wife lived and told Crowder to put on his seat belt. F.B. then asked about the rims. Crowder said Wife's husband took them off and put them in the garage. Crowder said he did not have anything to do with the missing rims and already gave F.B.

the keys to the car. F.B. said, "I just need to get my rims or there's going to be a problem."

When they got to Wife's street, F.B. said, "this is where I need your help." Crowder could tell Wife was not home and pointed out the house. When Crowder pulled out his phone, F.B. grabbed it and started looking through it. When Crowder objected, F.B. said, "You don't have to worry about nothing if everything's cool with my rims." F.B. put the phone in his back pocket.

When Wife arrived, F.B. went to Wife's side of the car. Crowder did not run away because his friend's family pulled up. He did not want to bring a man he did not know to their home and leave. Crowder went into the house with the children. Crowder told Son he did not know F.B. and he was "forced" to come. Crowder said he asked Son for his father's gun because Crowder thought F.B. had a gun. Crowder said he got a gun from a closet, went into the bathroom, and put the gun in his pants. Crowder asked Son if he could see the gun. When Son said he could see it, Crowder asked Son for a shirt to cover the gun. Son got one of his father's shirts, which Crowder put on over the shirt he was wearing.

Crowder and Son went back outside where F.B. and Wife were discussing something. Wife told Son she was okay and told him to go back in the house. Wife confirmed Crowder did not owe her husband money. F.B. said he was not concerned about that and just wanted his rims. He told Crowder to "go away." Crowder returned to the house and waited near the front door.

When Wife came to the front door alone, Crowder asked where F.B. was. Wife said he was in the backyard. Crowder told her to call the police. At that moment, the backyard gate opened. F.B. walked out of the gate and came to the front door.

F.B. asked Crowder if he had the rims. Crowder said, "Man, I told you, I don't have your rims" and stepped out of the house.

F.B. then said he wanted to look in the house. Wife said he was not going to look in the house. However, F.B. went toward the door as though he were going to enter the house. Crowder pulled the gun out, pointed it at F.B.'s head, and yelled, "Back the fuck up out of this house." Crowder asked for the keys to the friend's car, which F.B. had in his back pocket. F.B. looked at Crowder and reached down toward his pocket where Crowder had seen a bulge. Crowder thought F.B. was going for a pistol. Crowder pulled the gun down and shot F.B. in the arm.

F.B. fell into the house through the door. He then raised up and shut the door on Crowder. Crowder knocked on the door and asked Wife to open the door. Crowder said he did not know the man. Wife told Crowder to go away because she had her kids there.

Crowder went down the street, put the gun in a trash can, and offered money to two individuals nearby for a ride. When one man asked why, Crowder said he had stabbed someone. The men said no.

When police officers arrived in the area, Crowder called to them saying, "Hey, hey, I'm right here. Here I am." As a police officer ordered him down to the ground,

Crowder said, "Man, I'm the victim. I was kidnapped." Crowder told them where the gun was located.

Crowder said he did not intend to kill F.B. He just wanted him to stop, back out of the house, and leave. Crowder felt he was protecting Wife's family. Crowder shot F.B. when F.B. became aggressive toward the family.

The defense introduced evidence of F.B.'s prior acts of violence including a prior assault , a domestic violence incident in which he pointed a gun at a woman he was dating, and an assault against several police officers in which F.B. repeatedly resisted arrest and disarmed an officer of his Taser before F.B. was forcibly subdued.

DISCUSSION

I

Crowder contends the court abused its discretion when it denied the motion to strike his prior strike convictions. Crowder specifically contends the court did not consider the circumstances of the offense, including the fact the jury's conviction of the lesser offense of voluntary manslaughter meant the jury found Crowder's culpability mitigated based on either imperfect self-defense or imperfect defense of others. Crowder contends the case must have been close given the jury's request for readback of testimony from Crowder and the witnesses to the shooting and the jury's request for clarification of the term "imminent danger." We disagree.

Section 1385, subdivision (a), permits a trial court to order an action dismissed "in the furtherance of justice." This includes the discretion for the court to "strike factual

allegations relevant to sentencing, such as the allegation that a defendant has prior felony convictions." (*Romero, supra*, 13 Cal.4th at p. 504.) However, the "court's discretion to strike prior felony conviction allegations in furtherance of justice is limited." (*Id.* at p. 530.) It " ' "requires consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal." ' " (*Ibid.*)

" '[T]he [t]hree [s]trikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike, unless the sentencing court "conclud[es] that an exception to the scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the [t]hree [s]trikes scheme." ' " (*People v. Carmony* (2004) 33 Cal.4th 367, 377 (*Carmony*).) "[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so." (*Id.* at p. 378.)

In exercising its discretion, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence

should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the court's decision under section 1385 for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 375.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at p. 377.)

The court read detailed briefing submitted by counsel and heard argument. The court considered the nature of the felony for which Crowder was being sentenced along with Crowder's criminal history. The court understood it had the discretion to strike prior convictions for serious or violent felonies but declined to do so saying "this is precisely why we have the three-strikes law." The court noted Crowder's two prior convictions were for robbery, one of which involved a weapon. The court observed the purpose of the three-strikes law "is to eliminate any and all serious and violent felonies, particularly with use of firearms."

The court also noted Crowder was not free and clear of incarceration for a sufficient period to consider remoteness of the crimes or rehabilitation. The court commented about how both a prior crime and the current crime involved the use of a weapon. The court stated, "Albeit, the geography may be different, ..., it appears that the conduct remains the same."

When it imposed the sentence, the court recognized the jury found Crowder guilty of voluntary manslaughter rather than first- or second-degree murder. The court

acknowledged Crowder was going to be sentenced to a long time in prison based on the law, including the three strikes law. However, a court may not properly strike a sentencing allegation "if 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant.' " (*Romero, supra*, 13 Cal.4th at p. 531.)

We conclude " 'the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law' " and, therefore, did not abuse its discretion in denying Crowder's motion to strike his prior convictions. (*Carmony, supra*, 33 Cal.4th at p. 378.)

II

After Crowder was sentenced in December 2017, while this appeal was pending, several statutes were amended to give trial courts additional discretion related to sentencing enhancements for true findings on allegations regarding the use of firearms and serious prior felonies.

"The Legislature amended section 12022.5, subdivision (c), and section 12022.53, subdivision (h), effective January 1, 2018, to give the trial court discretion to strike, in the interest of justice, a firearm enhancement imposed under those two statutes." (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1079–1080.)

The Legislature amended sections 667, subdivision (a) and 1385, subdivision (b), effective January 1, 2019, to allow a trial court to exercise its discretion to strike or dismiss prior serious felony convictions for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Previously, a trial court was required by statute to impose a five-year

consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under [s]ection 667." (Former § 1385, subd. (b).) However, amended section 1385 eliminated the prohibition on striking a serious felony enhancement. (Stats. 2018, ch. 1013, § 2.)

Because Crowder's conviction is not yet final, the People concede the amended statutes apply retroactively. (*People v. Chavez* (2018) 22 Cal.App.5th 663, 712 [statutory amendments giving trial court discretion to strike or dismiss firearm enhancement applies to all nonfinal judgments]; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–973 [statutory amendments giving court discretion to strike or dismiss a prior serious felony applies to all cases not yet final], citing *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307–308; *People v. Francis* (1969) 71 Cal.2d 66, 76, and *In re Estrada* (1965) 63 Cal.2d 740, 744–745.)

However, the People contend remand is not necessary because the court declined to strike Crowder's prior strikes and would be unlikely to dismiss the punishment for the serious felony enhancements for the same convictions or the gun enhancement. We disagree.

" '[W]hen the record shows that the trial court proceeded with sentencing on the ... assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.' " (*People v.*

McDaniels (2018) 22 Cal.App.5th 420, 425.) Remand is not required if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*)

In this case, the court did not dismiss the prior strike convictions saying, "this is precisely why we have the three strikes law." Nevertheless, the court commented about the fact that the jury determined the crime was voluntary manslaughter as opposed to first- or second-degree murder and noted the length of the prison sentence. The court said, the "argument about imperfect self-defense was that this was really a bad, bad choice by Mr. Crowder. And he shouldn't have done what he did. And, clearly, what he's going to end up with, when we're all said and done here, is 39 years[.] ... [¶] ... [it] is a long time in prison." The court found the factors in aggravation and mitigation "to be essentially in balance" and made sentencing choices within its discretion accordingly. That is not to say, however, the court would have made the same choices if it knew it had additional discretion. This is not a case where the court expressed a clear intent to impose a maximum sentence, as evidenced by the fact it chose a midterm sentence for the firearm enhancement. Accordingly, remand is proper for the court to consider whether to exercise its newly conferred discretion under the amended statutes.

III

If the court declines to strike or dismiss the sentencing enhancements and chooses to reinstate the original sentence, the parties agree the abstract of judgment should be amended to correctly reflect the proper statutory references for each of the court's

sentence enhancements. The court's imposition of the firearm enhancement should be referred to under section 12022.5, subdivision (a), rather than 12022.53, subdivision (d) because voluntary manslaughter is not a predicate offense under section 12022.53, subdivision (a). Additionally, the prior serious felony enhancements were imposed under section 667, subdivision (a), rather than section 667.5, subdivision (b) as reflected on the current abstract of judgment.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing with directions for the trial court to consider whether to strike or dismiss the punishment for one or both prior serious felony enhancements under amended sections 667, subdivision (a), and 1385, subdivision (b), and to consider whether to strike or dismiss the punishment for the firearm enhancement under amended section 12022.5, subdivision (c).

If the court declines to strike or dismiss the enhancements, the court shall reinstate the sentence and amend the abstract of judgment to correctly reflect imposition of a firearm enhancement under section 12022.5, subdivision (a), rather than 12022.53, subdivision (d), and prior serious felony enhancements under section 667, subdivision (a), rather than section 667.5, subdivision (b). If the court exercises its discretion to dismiss the punishment for one or more of the enhancements, the court shall resentence Crowder and prepare an amended abstract of judgment. In either case, the court shall

forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

IRION, J.